4

SUPREME COURT, U. S.
FILED.
JAN 23 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 108.

J. M. CEBALLOS AND COMPANY,

Appellants,

vs.

THE UNITED STATES,

Appellee.

BRIEF FOR APPELLANTS.

[Attorney-General's Opinion Appended.]

WILLIAM V. ROWE,
JOHN J. HEMPHILL,
Of Counsel.

SULLIVAN & CROMWELL,
Attorneys.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 108.

J. M. CEBALLOS AND COMPANY,
Appellants,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

Statement.

This case involves the construction of a contract between J. M. Ceballos and Company and the United States for the repatriation of the Philippine prisoners under the Treaty of Peace with Spain. The principal question involved is as to whether the United States shall pay first-class rates for the transportation of the "wives and children" of Spanish "officers," and other persons of equal rank, who were in fact returned to Spain by the appellants, in the steamship cabins, with such "officers," as first class passengers. The Government insists that third-class, or steerage, rates alone can be recovered.

Facts.

As matter of history, we know that, on August 12, 1898, Mr. Day, the Secretary of State, and Mr. Cambon, French minister at Washington, acting for the Spanish Government, entered into a protocol for the cessation of hostilities between the United States and Spain. Article 3 of this protocol is as follows:

> "The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines."

The city of Manila surrendered on the 13th of August, 1898, and on August 14th the United States and the Spanish authorities agreed upon written terms of capitulation, of which Article 5 is as follows:

> "All questions relating to the repatriation of officers and men of the Spanish forces *and of their families* and of the *expenses* which said repatriation may occasion, shall be referred to the Government of the United States at Washington" (Rec., p. 26).

By the treaty of peace executed at Paris by representatives of Spain and the United States December 10, 1898, it was stipulated in paragraph 1, Article 5, that—

> "The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish *soldiers* taken as prisoners of war on the capture of Manilla by the American forces"—

and in Article 6, that—

> "Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the in-

surrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, *the United States* will release *all persons* made *prisoners of war* by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"*The Government of the United States will, at its own cost, return to Spain*, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, *prisoners released* or caused to be released by them, respectively, *under this article*" (Rec., pp. 26–27).

The Court of Claims found that—

"there was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men. Many of these were in a pitiable condition physically, *exhausted with exposure and disease—1,200 being sick at one time*—all of them fed, guarded, and attended at the expense of the United States. *Small-pox had been prevalent and infection was apprehended.* The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had *wives and children* with them. There were besides a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity, and lady pensioners. The United States treated all of these classes as prisoners of war*, and had *supreme control* of them after the surrender of Manila *until they were delivered aboard plaintiffs' ships* for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted" (Finding IV; Rec., p. 27).

The Court below also found that, in the then-existing "emergency," the appellants undertook,

under an *oral* agreement with the Government, the immediate return of these "prisoners of war," thus described, and for a period of *four months*, ranging from November 7, 1898, to March 4, 1899, continued to furnish such transportation, until the execution, on the latter date, of a formal written contract providing in detail therefor. The findings are as follows:

> "General Otis, commanding the United States forces in Manila, considered that *an emergency existed requiring immediate action*, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but *under an oral agreement with plaintiffs as hereinafter stated.* Bills for these shipments were rendered after the execution of the written contract.
>
> "In the *emergency* deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, *entered into an oral agreement* with the petitioners under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport *such of the Philippine prisoners as the United States desired to return to Spain*, the price to be paid for such transportation *to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into* under the terms of a treaty of peace between the United States and Spain.
>
> "*Under this oral agreement* the petitioners immediately began furnishing vessels, and the transportation of the Philippine prisoners commenced by the first vessel in charge of plaintiffs which sailed from Manila November 7, 1898, and *continued until another and a written contract* was entered into for the

transportation of those prisoners not transported under the oral agreement" (Findings V and VI; Rec., pp. 27–28).

On January 20, 1899, the Quartermaster-General of the Army advertised for bids for suitable vessels for the repatriation of the Spanish prisoners.

The petitioners submitted their bid in regular form, which, as the Court found (Rec., pp. 28-29)—

> "was accepted, and on March 4, 1899, the contract was put in writing and signed by Hon. R. A. Alger, Secretary of War, on behalf of the United States, and by J. M. Ceballos & Co., through R. A. C. Smith, attorney-in-fact" (Rec., p. 30).

The written Philippines contract is as follows:

> "Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that
>
> "'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish *soldiers* taken as prisoners of war on the capture of Manila by the American forces.'
>
> "And in Article VI, which reads as follows:
>
> "'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.
>
> "'Reciprocally, the United States will *release all persons* made *prisoners of war*, by the American forces, and will undertake to obtain the release of all Spansh prisoners in the hands of the insurgents in Cuba and the Philippines.
>
> "'*The Government of the United States will, at its own cost, return to Spain*, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico,

and the Philippines, according to the situation of their respective homes, *prisoners released* or caused to be released by them, respectively, *under this article.*'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States,

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, *for the transportation of the said prisoners of war*, from the Philippine Islands to Spain, *as are designated in the terms of the treaty of peace, referred to and quoted herein.*

"The said J. M. Ceballos and Company hereby agree to furnish *good and safe transportation* for such number of *prisoners of war* AND *persons as may be designated by the Secretary of War*, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the *safe and comfortable* transportation of the *prisoners of war* AND *such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men* AND *other persons on board each ship*; that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the *prisoners of war* AND *other*

persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of *each commissioned officer*, the sum of *two hundred and fifteen dollars* ($215.00), and for *each enlisted man, private soldier*, OR *other person designated by the Secretary of War for transportation* the sum of *seventy-three dollars and seventy five cents* ($73.75), the said sums to be due and payable upon evidence that said *officers, enlisted men*, OR *persons* have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the *prisoners of war* AND *all other persons to be transported* shall be *delivered by the United States on board the ships* at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of *officers, enlisted men*, OR *other persons* to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made upon the basis of the number of *officers, enlisted men*, AND *persons* counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and

should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

"No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

"In witness whereof we hereunto set our hands and seals this 4th day of March, A. D. 1899.

"(S'g'd) R. A. ALGER, [SEAL.]
Sec'l'y of War.
"J. M. CEBALLOS & Co., [SEAL.]
"By R. A. C. SMITH,
"*Attorney in Fact.*

"Witnesses:
"(S'g'd) G. D. H. HOPKINS,
"*As to R. A. A.*
" " L. F. RANDOLPH."
(Rec., pp. 30–32.)

The Court also found that, in performing the obligations of their contract—which, as we have seen, included both the *oral* agreement, *under which transportation service for four months was furnished*, and the formal written contract, under which the balance of such service was rendered—the appellants actually carried in the *cabins* the "*officers*, civil and military, *with* their *respective families*." In the steerage, the Court also found, the appellants carried the "enlisted men and their *families* AND *other persons* ENTITLED *to third-class passage*." It will be remembered that the only "other persons" so "*entitled*" were, *not* the "*prisoners of war*," *but* the "other persons *designated by the Secretary of War for transportation*" (Rec., p. 31—next to last par.).

The finding reads as follows:

"*In performing the obligations of their contract* the petitioners supplied vessels with

> cabin accommodations and steerage accommodations, as had been agreed, and *in the cabins* were carried the *officers*, civil and military, *with their respective families*, and in the steerage the enlisted men and their families AND *other persons entitled to third class passage*" (Rec., p. 32).

The total number of persons transported in the vessels provided by Ceballos & Co. as claimed by them, was 17,527; of whom 3,860 were transported as first-class or cabin passengers and 13,667 were transported as third-class or steerage (Rec. p. 19). This includes 198 persons not paid for by the War Department, and alleged by defendant not to have been embraced in certain requisitions, although actually transported, as shown by the certificate of the American Consul at the port of landing (Rec., p. 36, bottom—37).

The Court found (Rec., p. 38) that the total number of prisoners of all classes delivered by the United States aboard ship (for which there were quartermaster requisitions), and transported by the appellants, was 17,305—that is, 1,938 naval and military and civil *officers* and 15,367 enlisted men and other persons. The Court does not find the numbers of the wives and children of officers and other persons carried as first-class passengers, but includes them all under the head of "other persons," along with the "enlisted men," who were transported in the steerage. The Court apparently found the above number of 17,305 by deducting from the 17,527, claimed by petitioners, 24 persons alleged to have been counted twice and the 198 persons, actually transported, but alleged not to have been included in certain requisitions by the quartermaster at Manila.

The total amount claimed by the petitioners and appellants for the transportation furnished under their contract is $1,837,841.25 (Rec., pp. 19-20), of which they have been paid $1,544,595 (Rec., p. 37), and they asked judgment for the balance, amounting to $293,246.25 (Rec., pp. 20-21).

In the Court below, at the request of the Court, the Government admitted that if "wives and children" were to be carried at *cabin* rates, then the appellants were entitled to judgment, on that branch of their claim, in the sum of $262,468.25.

The Cuban Contract.

Previously, the appellants had agreed to transport, and had successfully carried to Spain, the *Cuban* prisoners. In this way, therefore, through this transportation service provided by the appellants, the United States was enabled, in fulfilment of its treaty obligation to the Spanish Government, to return to Spain, "at its own cost," "all persons made prisoners of war by the American forces." *For this single transaction and service,*—the return of all such Spanish prisoners by the United States—it merely happened that *three contracts with the appellants* were required—first, the *written Cuban* contract, *secondly*, the *oral Philippines* agreement, and thirdly, the *written Philippines* contract.

In view of our motion for additional findings, the determination of which was postponed until the hearing on the merits, we append hereto, for the convenience and information of the Court, a copy of the Cuban contract and a brief statement concerning the accommodations furnished to "wives and children" of "officers" thereunder and the compensation paid therefor. It should be said that all of these matters were parts of the same general transaction—the return of Spanish prisoners—were before the Court below, were used by both parties upon the argument below, and are matters of record and of general and familiar history—within the judicial cognizance of this Court—which, in the interests of justice, should be here considered.

The Cuban contract was as follows:

> "Sealed proposals having been invited for the transportation of the Spanish prisoners of war who surrendered to the United States forces in Cuba, from Santiago de Cuba to

Cadiz, or such port of same as might thereafter be designated, and the proposal submitted by J. M. Ceballos & Company, of New York, having been duly accepted.

"It is hereby, on this twenty-first day of July, 1898, agreed by and between the Secretary of War of the United States and said J. M. Ceballos & Company, that said company shall transport well and safely *all of the troops of Spain that were surrendered* by General Toral to the Army of the United States in Cuba, in the capitulation entered into by him at Santiago de Cuba, from said Santiago to such port in Spain as the Secretary of War of the United States may designate, and that the Government of the United States will pay for such transportation, and for the subsistence and delivery on shore of *the prisoners*, the sum of twenty dollars ($20) for *each enlisted man or private soldier*, and the sum of fifty-five dollars ($55) for *each officer* so delivered.

"The said company further stipulates that said subsistence furnished by the company shall be equal to United States Army garrison rations; that *cabin* accommodations are to be supplied for the said *officers*, and third-class or *steerage* accommodations, having suitable galley accommodations with ample space and ventilation, for the *enlisted men or privates;* that for the purpose aforesaid it will have at Santiago de Cuba within seventeen (17) calendar days from this day (that is to say, on or before the seventh day of the month now next following) seven (7) steam vessels with a total capacity for the conveyance of at least ten thousand (10,000) prisoners in conformity with the foregoing stipulations, and ready to take them on board and proceed immediately to Spain; and the remaining vessels, in number and capacity as the Secretary of War may notify the company, within twenty-one (21) days from the date of such notice.

"The Secretary of War stipulates that the United States will give safe conduct as against the Army and Navy of the United States to the vessels of the company engaged in the business aforesaid while proceeding to Santiago and from there to Spain, such safe con-

duct not to apply to ships already seized or in blockaded ports, and the ships employed as aforesaid to have only such armament as is customarily carried by merchant ships. Such safe conduct is to extend to foreign West Indian, Cuban and Spanish ports and to remain in effect until the prisoners are unloaded in a Spanish port designated, and is expressly made applicable to steamers of the Spanish Transatlantic Line, under the Spanish flag.

"For the better security of such safe conduct a document in the following form and duly signed will be furnished to the company for each ship, which shall be exhibited on demand, together with a copy of this contract, to any officer of the Army or Navy of the United States visiting the vessel:

"The President of the United States to all whom it may concern, greeting: This is to certify that the ——— is employed under contract with the Government of the United States in the business of transporting from Santiago de Cuba to a port in Spain Spanish prisoners heretofore surrendered to the Army of the United States in Cuba; that the Government of the United States has guaranteed safe conduct for this purpose to the ——— in going to and from Santiago de Cuba and until the disembarking of said prisoners in a Spanish port.

'All persons under the jurisdiction of the United States are required to respect such guantee.

'———— ————.'

"The company further stipulates that it will furnish the bond of ———— for the proper and faithful performance of this contract.

"The Secretary of War agrees that *the United States will deliver the prisoners aforesaid on board* at Santiago within a reasonable time after the vessels are ready, and to the number of at least ten thousand (10,000) *men* five hundred (500) *officers*, and that the payment of the said twenty ($20.00) dollars and fifty-five ($55.00) dollars for *each man and officer* to the numbers last aforesaid shall be made when satisfactory evidence that the prisoners have been transported and delivered

in accordance with this contract is presented to him.

"Witness our hands and seals this twenty-first day of July, 1898.

"R. A. ALGER,
"*Secy. of War.*
"J. M. CEBALLOS & Co."

Under this *Cuban* contract, the *United States actually paid* for "*wives and children*" of "*officers,*" all of whom were carried in the *cabins, the full cabin rates. No doubt or question on the subject was ever raised.*

Specification of Errors.

1st. The Court erred in holding that the "wives and children" of Spanish "officers," civil and military, and other non combatants, such as priests, nuns, sisters of charity and lady pensioners, although actually "treated" by the United States authorities "as prisoners of war" (Finding IV, Rec., p. 27), were nevertheless embraced in that class described in the contract as "other persons designated by the Secretary of War for transportation," and that they were, therefore, to be paid for at the third-class rate specified in the contract, to wit: $73.75.

2d. The Court erred in holding that the wives and children of the Spanish military and civil officers, the nuns, priests, sisters of charity and other like persons, being in fact prisoners of war, as found by the Court (Finding IV), were not properly and legally to be classed as "prisoners of war," and, therefore, to be paid for at the first-class rate specified in the contract, to-wit: $215.00, when they in fact enjoyed first-class accommodationsaboard ship.

3d. The Court erred in holding that the wives and children of Spanish officers, civil and military, and other non-combatant prisoners of war, although

transported as first-class passengers and afforded cabin accommodations aboard ship, were to be paid for at the third-class rate specified in the contract, to-wit: $73.75.

4th. The Court erred in holding that the Appellants, Ceballos & Company, were not entitled to be paid for the 198 persons actually carried in the last fifteen sailings of ships, on the allegation that they were not covered by the Quartermaster's requisition, although said persons were actually transported and delivered in Spain in accordance with the provisions of the contract.

5th. The Court erred in holding that the balance due to the petitioners by the United States for the service rendered under the contract sued upon in this case is $5,391.25, whereas the Court should have found that the balance actually due is $293,246.25.

POINTS.

FIRST POINT.

It was clearly the intention of the parties to provide for the transportation from the Philippine Islands to Spain of two distinct classes—first, of all Spanish "prisoners of war," "AND," secondly, of "such other persons as may be designated by the Secretary of War."

"Wives and children" were "treated" by both parties throughout "as prisoners of war," and not as "such other persons," within the description of the contract.

It is also equally clear that it was the intention of the parties that the "wives and children" in question should have precisely the same accommodations and be transported at the same rates as those provided for their husbands and fathers, who are classed as "officers," and the words of the contract must be so construed as to effectuate such intention.

On this point, the practical construction to this effect, placed by the parties upon the identical terms of the Cuban contract in this behalf—a contract between the same parties, concerning the same general transaction and subject-matter—and also upon the original oral Philippines agreement, is absolutely conclusive.

The Court of Claims, therefore, erred in sustaining the Government's contention, and classing officers' "wives and children" as "such other persons," who were entitled to only steerage accommodations, at third-class rates.

I.

The Controlling Principles of Construction.

In the interpretation of this instrument, the Court is required to examine the contract as a whole, to place itself in the situation of the parties at the time, and, in the light of the relations of the parties and the surrounding circumstances, to give to the special words of the contract such a construction as

will carry out the manifest general intention of the parties, and will accord with their own *practical* interpretation. The language of the contract must, if necessary, be subordinated to its manifest reason and purpose, and, of two possible constructions, the one just and equitable and the other working out an unjust and unconscionable result, the former must prevail. If the language be that of one party to the contract (here the United States), any doubt as to its construction must be conclusively resolved against that party.

These familiar and fundamental rules, when applied to the construction of the contract in the case at bar, are conclusive. Notwithstanding the fact that they are matters of every-day debate and application in this Court, their importance, in any consideration of the case at bar, will justify a brief reference to the expressions of the Court on the general subject.

It is, of course, well-settled that the United States, in contracting with its citizens, is controlled by, and that the Court of Claims and this Court are required to apply, precisely the same principles that govern in ordinary controversies between individual citizens. As this Court has said:

> "We hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals."
>
> *Smoot's Case*, 15 Wall., 36, at p. 47.

Again:

> "The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."
>
> *U. S.* v. *Bostwick*, 94 U. S., at p. 66.

This contract, based upon the proposals of the Quartermaster-General's office (Finding VII, Rec., p. 28), was *a Government contract, drawn, in ac-*

cordance with its custom in such cases, by the Government itself. Its language, therefore, must be *construed most strongly against the Government.* As this Court has said, speaking of such a contract with the United States, drawn by an army officer as its representative, and therefore to be *construed against the Government:*

> "Its doubtful expressions should, therefore, according to a well-known rule, be *construed most strongly against the party who uses the language.*"
>
> *Garrison* vs. *U. S.*, 7 Wall., 688, 690.

In such a case, the construction must be most "favorable" to the other party.

Noonan v. *Bradley*, 9 Wall., 394, 407.

As to the other general principles involved, the Court has said:

> "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."
>
> *Merriam* vs. *U. S.*, 107 U. S., 437, at p. 441.

In *O'Brien* vs. *Miller*, 168 U. S., 287, at p. 297, this Court said:

> "But the question presented involves *not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract.* The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion

> of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. *The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.*"

That case, like the case at bar, involved the extension of a single word of the contract to cover a larger and different subject-matter. A bottomry bond was made void, under its defeasance clause, in case of the "utter loss of the *said vessel*." The bond, however, referred to a transaction between the parties in which *two vessels* were involved. In holding that the words of the bond referred to *both* —that is, the loss of either of the two—this Court said:

> "Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible, in reason, to construe the word 'vessel' in the defeasance clause as not applying to *both* the *Johnson* and the *Leslie*."

In *Scott* vs. *United States*, 12 Wall. 443, Scott had contracted to furnish *all* the transportation the United States might require between Little Rock and Fort Smith. This Court, in holding that the contract did not require the United States to unload cargoes coming up the river from points below to Little Rock, in order to give Scott the transportation of such cargoes to Fort Smith, said (at pp. 444–5):

> "In cases like this *it is the duty of the Court to assume the standpoint occupied by*

> *the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning.* It must have been known to both Scott and the quartermaster that such transportation would be required as that under consideration. It is incredible that they intended to subject the United States to the delay, inconvenience and expense of the unlivery and reloading of every cargo which came up the river to Little Rock only to feed Scott's contract and meet its demands. * * * *A proposition, from which flow consequences so unreasonable, must itself be regarded as of that character.*"

In *Bradley* vs. *Washington Packet Co.*, 13 Pet. 89, the defendant hired the ship "F." until the ship "S." should be "placed on the route to Potomac Creek." In plaintiff's suit for the hire, the defendant was allowed to show that both parties knew that the ship was intended for the transportation of mails on the Potomac, and that navigation on the river was interrupted by ice at certain periods, during which time the mails were conveyed by land. The defendant contended that, construed in the light of these circumstances, the contract did not require him to pay for the periods of closed navigation, although the contract itself was silent on the subject. In holding the evidence to be material, this Court said (at pp. 90-100):

> "We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and, in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject matter."

And this Court has also said:

> "When an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."
>
> *Noonan* vs. *Bradley*, 9 Wall., 394, 407.

So it has been well said that—

> "Where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract, and the other an unconscionable one, the former construction should prevail."
>
> *Coghlan* vs. *Stetson*, 19 Fed. Rep., 727, 729.

It is likewise well-settled that there is no difference between the rules applicable to the construction of contracts and those controlling in the case of statutes. Both statutes and contracts must receive a just and sensible construction, which will effectuate their spirit and intent, and work out reasonable results and avoid absurd consequences. As this Court has said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."
>
> *Trinity Church* vs. *U. S.*, 143 U. S., 461.

And—

> "It is a recognized rule in the construction of statutes, that '*a thing which is within the intention of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers.*' *This proposition is equally applicable to other*

> *written instruments.* The object of all symbols is to convey the meaning of those who use them, and, when that can be ascertained, it is conclusive. *The intent of the law makers is the law, and here the intent of the parties is the contract.*"
>
> *Insurance Company* vs. *Gridley*, 100 U. S., 614, 615-16.

In arriving at the intention of the law makers (and, of course, the same rule must hold in a search for the intention of contracting parties), words having a special meaning, where the reason and spirit of the statute or instrument are general, must be interpreted in accordance with the general purpose.

In *Beawfage's* case, 10 Coke, 99*b*, 101*b*, the familiar rule is thus stated:

> "*Quando verba statuti sunt specialia, ratio autem generalis, statutum generaliter est intelligendum.*"

As the interpretation of the special designation, "officers," to include "wives and children," involves, to some extent, an application of these rules in the construction of the contract in question, further illustrations of their repeated application by this court and other courts of authority, even in cases of statutory construction, may be enlightening.

In *Walnut* vs. *Wade*, 103 U. S., 683, this Court limited the word "inhabitants" in a statute to "legal voters," because the sense and reason of the situation required it, saying (at p. 694):

> "The act, it is true, requires the approval of the 'inhabitants' of the town; in its broadest sense this would include all sexes, ages and conditions. To require such approval by a vote of the 'inhabitants,' in this sense, would be an *absurdity*. The act itself is its own interpreter and shows that this is not its meaning."

In *Winslow* vs. *Kimball*, 25 Maine, 493, a statute peclared void all bequests made to a "*subscribing*

witness." The Court held that, notwithstanding the fact that the words of the statute, taken in their *literal* signification, required a *contrary* conclusion, it must be held, in the light of the remedy intended to be afforded and the mischief to be cured, that a bequest to the "*husband*" of a subscribing witness was included within the *reason* and *spirit* of the statute, and was void.

In *Eshleman's Appeal*, 74 Penn. St., 42, the Court held that, under a statute defining an advancement as a gift from a "parent" to a "*child*," a gift to a "*grandchild*" must be deemed such an advancement, because otherwise the purpose of the statute would be defeated.

So in *Crane* vs. *Alling*, 14 N. J. Law, 593, a statute providing for the continuance of suits by the executor or administrator of a deceased party was held, notwithstanding the narrowness and limitation of its terms, to include within its spirit and intent an administrator *de bonis non.*

In *Queen* vs. *Collingwood*, 12 Ad. & El. (N. S.), 681, a statute providing for a bastardy-order in the case of a *single woman*, was held, in the light of its spirit and purpose, clearly to apply to the case of a *married woman.*

So the Circuit Court of Appeals for the Eighth Circuit, in construing a general statute providing for the cutting of dead timber on certain timber preserves, held that it must mean only such timber as a prudent owner would cut to prevent further deterioration, on the ground that an acceptance of the literal meaning of the words would cause a useless waste, which Congress could never have intended.

U. S. vs. *Pine River Logging Co.*, 89 Fed. Rep., 907 (C. C. A., 8th Circuit).

In construing the limited liability statute, making it unlawful for *railroad corporations* to limit their liability to employees for negligence, the Circuit Court of Appeals for the Sixth Circuit held that, in view of the intent and purpose of the law, it was

plainly applicable to *receivers* of railways. Mr. Justice HARLAN, writing for the Court, said:

> *"To hold otherwise would be to subordinate the reason of the law altogether to its letter."*
>
> *Pierce* vs. *Van Dusen*, 78 Fed. Rep., 693, 696 (C. C. A., 6th Circuit).

In view of the fact that, in the framing of the Philippines contract, the parties must have been governed by their practice and experience under the previous completed contract for the repatriation of the *Cuban* prisoners, which was *between the same parties* (and which contained the same general terms and special designations—except the words "other persons who may be designated by the Secretary of War," which, as we shall see, were inserted in an entirely different connection and for another purpose in the Philippines contract—and *under which the "wives and children" of "officers" were carried with them in the cabins and paid for by the United States at first-class rates*), we must bear in mind the rule of *practical construction* so frequently and effectively applied in this Court, because, as the Court well knows, the "return to Spain" of "all persons made prisoners of war" was, under the terms of Article VI of the Treaty of Peace, *a single transaction* carried through in the performance of the single obligation thus created. It was merely an accident that, as it happened, two separate contracts were made, the one for Cuba and the other for the Philippines.

In *Insurance Co.* vs. *Dutcher*, 95 U. S., 269, this Court, in holding that a policyholder, notwithstanding the terms of his policy, was entitled to a paid-up policy without having paid premium notes which he had previously delivered to the insurance company, gave full and conclusive effect to the established fact that the company had *previously*

issued paid-up policies under precisely such conditions, saying (at p. 273):

> "The agreed fact must not be overlooked, that the company, from the time it commenced business, until the year 1871—more than two years after entering into the contract with the assured—always issued paid-up policies upon the basis of the full amount of premiums paid as they were paid by the assured appellee, making no distinction between the notes and money received by the company for the premiums.
>
> "*The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to.* The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.
> * * *
>
> "When it was proposed by the assurer to apply the new rule and practice in this case, the assured might well say '*non in hæc fedora veni*,' and insist upon the interpretation which prevailed in other like cases when the parties became bound to each other, and continuously, for two years later. *The proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt.*"

So it may be said in the case at bar that, if any change in the practice of the parties, in relation to the transportation, had been contemplated in the Philippines contract, so as to exclude their "wives and children" from first-class accommodation with the "officers," and so as to relieve the United States from the obligation to pay therefor accordingly,

"*the proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt*"; but, as the Court has seen, no change whatsoever in phraseology was made, except the introduction of the clause as to "*such other persons* as may be designated by the Secretary of War," which, as we shall see, had no bearing upon the matter in controversy, but related to the transportation of an entirely different class of persons, *in addition to, and other than*, "*prisoners of war*," within which class the "wives and children" were specifically included. Failing to correct their practice in such a way as to "create certainty and exclude doubt," we should naturally expect, and, indeed, shall respectfully insist, that the United States is absolutely concluded by this practical construction of the previous Cuban contract, relating to the same subject-matter and a part of the same transaction between the same parties. *Cabin rates were paid by the Government under the Cuban contract, and no question was raised.*

This same practical construction, it will be remembered, was also followed under the pre-existing *oral* Philippine agreement, under which, for a period of four months prior to the written contract, the United States used the appellants' ships for the transportation of these "*wives and children*" *of* "*officers*" *in the cabins with their husbands and fathers.*

In construing a contract for public improvements in the District of Columbia, this Court, in holding that the *practical construction* placed upon the contract by the acts of the parties, *although at variance with its literal meaning, must prevail*, said:

> "The work, as actually done, was done under the direction and supervision of the district engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract and to be paid for at the contract price. *We think that the prac-*

tical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

District of Columbia vs. *Gallaher*, 124 U. S., 505, 510.

II.

The Contract and the Surrounding Circumstances.

In the light of the foregoing authorities and of the familiar rules which they express, we come to a further consideration of the facts.

The Terms of Capitulation.

The written terms of capitulation provided for the reference to the Government at Washington of all questions relating to the "repatriation" of the Spanish "officers and men" "*and of their families,*" and relating to the "*expenses*" therefor (Finding II, Rec., p. 26).

The Treaty.

We, accordingly, find that, while under Article V of the Treaty of Peace the United States agreed to "send back" the Spanish "*soldiers,*" Article VI required the "return to Spain" by the United States of "*all persons made prisoners of war*" in *Cuba* and the *Philippines*—all "at its own cost."

The similar Cuban contract and situation. No questions ever raised thereunder.

In fulfilling that obligation the United States first provided for the transportation of the Spanish pris-

oners in *Cuba* by a contract with the appellants which declared, in substantially the same terms as those found in the Philippines contract in the case at bar, that "cabin accommodations" should be supplied to "*officers*," with "third-class or steerage accommodations," "for the enlisted men or privates;" the United States to pay for such transportation "the sum of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for *each officer*." The contract distinctly provided for the transportation of "all of the *troops* of Spain that were surrendered by General Toral," and for no other class.

As a matter of fact, there was in Cuba, as in the Philippines, a large number of women and children, the "wives and children" of "officers" as well as of "enlisted men," and, notwithstanding the precise and special terms of the contract, *such "wives and children"* of "*officers*," it appears, were *actually carried* by these appellants *in the cabins with their husbands and fathers, and were actually paid for by the United States at the first-class rates* prescribed for "officers" having such cabin accommodation.

No question or doubt, it appears, was ever raised, and it was not deemed that there was any uncertainty in that contract to be remedied in the subsequent contract, for the Philippines transportation, between the same parties. Inasmuch as it does not appear that there was any mischief or uncertainty thus to be remedied, it is not singular—indeed, is quite natural—that we should find that *no change of phraseology* whatever, *in this respect*, was made by the parties in the later contract.

Philippines Situation.

Conditions required prompt repatriation both of the actual "prisoners of war," including "families," and of "such other persons as may be designated by the Secretary of War," for political, sanitary or other reasons satisfactory to him. Hence, the con-

tract and its performance were made to cover these extraordinary conditions.

As we have seen, in the Treaty of Peace executed at Paris on December 10, 1898, the Government of the United States undertook to "return to Spain," not merely "Spanish soldiers" (Art. V), but (Art. VI) "*all persons* made *prisoners of war*," as well as "all Spanish prisoners in the hands of the insurgents," whose release the United States undertook to obtain (Finding III, Rec., pp. 26-27). It appears that there was a large number of persons in both civil and military life who, *with their "wives and children*,"—their "*families*"—were in a pitiable condition, physically exhausted by exposure and disease, *including small-pox*, and whom it was desirable to ship away from Manila and *to get rid of at any cost, in order to avoid infection and other serious drains on the resources of the United States.* Besides these, there were many nurses, nuns, sisters of charity, lady pensioners and other ecclesiastical functionaries. On this subject, the Court of Claims found that—

> "There was surrendered to the United States forces at Manilla on August 13, 1898, a large number of civil, naval, and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men. *Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time*—all of them fed, guarded and attended at the expense of the United States. *Small-pox had been prevalent and infection was apprehended.* The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. *Many of these had wives and children with them.* There were besides a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity and lady pensioners*" (Findings IV, Rec., p. 27).

It was also found, in the same connection, that the United States—

> "*treated all of these classes as prisoners of war*" (same finding, Rec., p. 27).

In addition, as this Court judicially knows as matter of history, there were Spanish newspaper editors, ecclesiastics and other Spaniards who were constantly abusing and criticising the United States of America and its officials, and who were supposed to be rendering valuable aid to the insurgent cause in the Philippines, numbers of Spaniards actually officering the insurgent troops. It may very well be that the United States was doubtful as to whether all of such persons could properly be classed as "prisoners of war," within the meaning of the Treaty, and yet, historically, it is well known that General Otis and the other officials of the United States in the Philippines were most anxious to get rid of all that Spanish portion of the population. As the Court below, speaking of the historical fact, said (Rec., p. 41):

> "The situation of the prisoners and the small naval and military force of the United States among millions of natives made it *very desirable* for this Government *to rid the islands of Spanish influences as quickly as possible.*"

The Spanish element in the Philippines was always a discordant one; was at one time hated by the Filipinos, but afterwards, to some extent, proceeded to aid them as against the United States; and was continually a thorn in the flesh. It must, at this time, have been largely composed of the riff-raff of the long Spanish occupation. The *Spanish friars* were an important ruling class, locally, and were cordially hated by the Filipinos, who felt towards them "great antagonism." "This hostility was beyond doubt one of the causes of the rebellion of 1896." Indeed, Aguinaldo stated that

"the primary causes of the Philippine revolution were the *ecclesiastical corporations*," and he—

> "denounced as *dangerous to the interests of the Philippines* the allowance to the regular *Spanish clergy* to continue their rule in the islands, *believing that they would incite a counter-revolution* in the interests of Spain."
>
> 1 Report of Philippines Com. (Jan'y 31, 1900), at p. 130.

It was said that—

> "*The priests, the bad Spaniards, and these exploiters are the people who have made all the trouble.*"
>
> 2 *id.*, at pp. 8 and 1, 98, 99, 100.

See also—

> "Report of Major-General Otis on Military Operations and Civil Affairs in the Philippine Islands, 1899," pp 49, 51–52, 75–76, 164; also pp. 41 and 53.

Accordingly, we find that, by the terms of the contract, the Secretary of War reserved to himself the right to rid the Islands of all persons, whether actual "prisoners of war" or not, by providing that the appellants should transport, *not only* "*prisoners of war*," *but also* "*such other persons as the Secretary of War may designate.*"

The conclusive antecedent Philippines ORAL *agreement and its practical interpretation.*

For these reasons, we are not surprised to find that, as early as October, 1898, before the treaty was signed—

> "General Otis, commanding the United States forces in Manilla, considered that *an emergency* existed requiring immediate action." (Finding V, Rec., p. 27.)

He thereupon, it is further found—

> "On October 7 and October 24, 1898, cabled the War Department at Washington the re-

quest of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compania Transatlantica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but *under an oral agreement with plaintiffs* as hereinafter stated." (Finding V, Rec. p. 27.)

It then further appears that—

> "In the *emergency* deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into *an oral agreement with the petitioners*, under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport such of the Philippine *prisoners* as the United States *desired to return to Spain, the price to be paid for such transportation to be the price fixed* after the United States should advertise for bids for such transportation, *under contract expected thereafter to be entered into* under the terms of a treaty of peace between the United States and Spain.
>
> "*Under this oral agreement* the petitioners *immediately began furnishing vessels*, and the transportation of the Philippine *prisoners* commenced by the first vessel in charge of plaintiffs which sailed from Manila, *November 7, 1898*, and *continued until another and a written contract* was entered into for the transportation of those prisoners not transported under the oral agreement." (Finding VI, Rec. p. 28.)

These shipments, of course, included the officers' "*families*"—"*wives and children.*" (Rec. Findings X and XI, pp. 32-33, and V and VI, pp. 27-28)—who, as we have seen, were among the sick whom it was desirable to be rid of (Findings IV, Rec. 27). *This antecedent oral agreement and its practical construction thus become conclusive.*

It clearly appears that, when "*sick Spanish* OFFICERS *and* SOLDIERS" (these being *the only*

classes mentioned in the request for transportation) were, in the existing "emergency," transported to Spain by the appellants under this *oral* agreement, beginning as early as *November 7, 1898*, as requested by General Otis (Findings V and VI, Rec. pp. 27-28), there were *also transported*, as matter of course, "*in the cabins*," *with them*, "*their respective families*" (Finding X, Rec. p. 32). That was the procedure followed down to the time of the written contract, which thereupon "*fixed*" "*the price to be paid*," and *thereafter the same practice continued to the end* (Finding X, Rec. p. 32).

If, as appears, "their respective *families*" were thus transported upon such a simple request for the transportation of sick "*officers*," it must be assumed that, when the written contract similarly provided for the transportation of "officers," it was intended to include "their respective families in the same way.

The Subsequent Written Contract.

At the outset, it is worthy of note that these Cuban and Philippines contracts, as well as the advertisements or proposals for this transportation, were all devised and drawn by military men (doubtless in the Quartermaster-General's office where the advertisement was prepared—Finding VII, Rec. p. 28), who naturally employed only military terms—for example, "officers" and "enlisted men"—to cover the entire situation.

They were also Government contracts—*devised under the Quartermaster's proposals and drawn by the Government. The language was that of the Government, and must be construed most strongly against the Government.*

On *January 20, 1899* (Finding VII, Rec. p. 28), the United States first advertised for bids and proposals "for the transportation of the Spanish *prisoners of war* now in the Philippine Islands." In substantially the same language as that employed in

the Cuban contract, it was provided in that advertisement, notwithstanding the recognized existence of the women and children, that "cabin accommodations are to be supplied for the *officers* and third-class or steerage accommodations * * * for the *enlisted men.*" The number was stated to be "about 16,000 officers and enlisted men." It was required that the proposals should state the price per capita for transporting "officers" and for "enlisted men" (Finding VII, Rec., p. 28). A bid was made by the attorney in fact for the complainants substantially in the terms of the advertisement, the words "*officers*" and "*enlisted men*" (as in the Cuban contract, and in the request of General Otis for transportation under the *oral* contract) being alone employed (Finding VIII, Rec., pp. 29-30).

This bid of the appellants was accepted (Finding IX, Rec., p. 30), but, when, on March 4, 1899, the parties came to the formal expression of their contract in writing, covering this transportation (which, as we have seen, had actually begun, on the part of the appellants, trusting implicitly to the good faith of the United States, as early as November, 1898, four months before), it was seen, from the nature and actions of the Spaniards, and the circumstances to which we have adverted, that it was absolutely *essential to make provision, by some terms other and more general than those previously employed in the Cuban contract, for the possible transportation of those persons who might not be regarded strictly as "prisoners of war," and yet who, as we have seen, were annoying and dangerous elements in the Islands whom it was desirable, on all accounts, to be rid of and to return to Spain.*

Therefore, we find that, *in addition to the class, "prisoners of war,"* referred to in the treaty, and which, of course, included the "officers" and the "enlisted men," covered by the terms of the Cuban contract, the oral contract, and by the advertisement and bid in the case at bar, the parties ex-

pressly provided that the appellants should carry *an entirely different class of persons* among whom might be grouped all disturbing and disloyal elements, whom the United States might wish to send away from the Philippines and return to Spain. This *additional class* is described throughout the contract as "*such other persons as may be designated by the Secretary of War*"; and to "*such* other persons" the contract provides that "third-class or steerage accommodations" shall be given, like those provided for the "enlisted men." In the clause for the appellants' compensation, it was distinctly provided that *such "other person designated by the Secretary of War" should be paid for at the rate allowed for each "enlisted man" or "private soldier,"* that is to say, $73.75. (See Contract, Finding IX, Rec., pp. 30-31).

In this way the United States carefully provided for the complete fulfillment of its treaty obligations in respect to all "prisoners of war," and likewise provided the means for completely protecting itself in the Philippines by the expatriation and return to Spain of those dangerous elements in the Spanish population to which we have referred.

Thus, we see that there was a somewhat more extended and critical situation confronting the United States, when it came to frame the Philippines contract than that which it was required to meet in the case of the Cuban contract. In the latter case, there were merely the "prisoners" to be dealt with. In the Philippines, on the other hand, there was this element, seditious and, in view of our comparatively small force there, dangerous, which it was felt might extend beyond the bounds of a classification limited merely to "prisoners of war." Hence, the classification in this contract, and the provision for "*such other persons as may be designated by the Secretary of War.*"

It is seen, then, that, with this obvious and distinct purpose in mind to provide for persons *other than "prisoners of war,"* the phrase "such other

persons as may be designated by the Secretary of War" cannot possibly have any application to those persons who were classified and treated by the United States at all times as such "prisoners of war."

As we have pointed out, while Article V of the treaty provides for the return to Spain of the Spanish "soldiers," Article VI, *in addition*, specifically refers to the return of "*all persons* made prisoners of war;" so that the "prisoners of war," thus to be returned, were not limited to "soldiers," but included "all persons" whom the United States might class as such "prisoners."

Turning, now, to the contract (Rec., pp. 30-32), we find that, after reciting the treaty and the acceptance of the appellants' proposal for the return of the "Spanish prisoners," it declared that the agreement had been entered into for the transportation of "*said prisoners of war*," "*as are designated in the terms of the treaty of peace* referred to and quoted herein."

With the obligation of the United States defined in the the treaty as extending to "*all persons*" made "prisoner of war," we then find that the United States, through its Attorney-General, speaking of this contract, has admitted that—

> "As between these contracting parties, *it rested alone with the United States to say whom it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract.*"
>
> 23 Opin. Atty-Genl., 9, at p. 17.

Under all of these circumstances and conditions to which we have referred, it appears, then, that the United States deemed it wise, as we have said, to *extend* this obligation created by the treaty to include the return to Spain not merely of

"prisoners of war," but of *all "other persons designated by the Secretary of War."*

In other words, the contrast in the contract is not made between different classes of "prisoners of war," of whom the "other persons" are made a subordinate or third class with "officers" and "enlisted men," but is, on the contrary, throughout all of its paragraphs dealing with the question, plainly made between "*prisoners of war*" on the one side, "AND *such other persons as may be designated by the Secretary of War,*" on the other.

We are, therefore, not in any way concerned with the identification of those persons whom the United States might group or class as "persons designated by the Secretary of War," but only with the vital question, *What persons did the United States classify as "prisoners of war"?* On this head, the facts found below are absolutely conclusive, and, as we conceive, finally dispose of the case.

The Court of Claims found (Finding IV, Rec., p. 27), as we have seen, that—

> "there was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men."

Also that—

> "The *civil prisoners* included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had *wives and children* with them. There were, besides, a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity and lady pensioners.*"

The question then arises as to how the United States treated and classified these "*families*," these "*wives and children*," and these "*nurses*," "*nuns*," "*sisters of charity, and lady pensioners*"? Particularly are we interested in the question as to how the

"wives and children" and "families" were regarded. The Court of Claims has answered that question conclusively. It has found that—

> "*The United States treated all* of these classes *as prisoners of war*, and had *supreme control of them* after the surrender of Manila *until they were delivered aboard plaintiff's ships for transportation*, at which time the *supervision* of the United States ceased. Spanish officers had, in the mean time, only such supervision over their troops as the United States permitted."
>
> Finding IV, Rec., p. 27.

Inasmuch, therefore, as the United States, with complete power to select and reject, in fact thus treated the "*families*"—the "*wives and children*"—of officers and of civil prisoners, and the other women found among the civilians, *as* "*prisoners of war*," such persons became, under the *terms* of the contract, absolutely entitled to transportation, *not as* "*other persons designated*," *but* as such "*prisoners of war.*"

The specification of "prisoners of war" in the contract, is the limited and arbitrary one found in the Cuban Contract, and in General Otis' request for transportation under the oral contract (Finding V, Rec., p. 27), of "officers," on the one hand, and "soldiers" or "enlisted men," on the other. It is the very generality of such description, which presents the only question of construction in this case, because, as we have said, and are about to point out in the course of a more detailed analysis of the contract, the words "other persons," referred *not to any of these* classes, grouped as "prisoners of war," but to *the entirely different class*, described by the contract (in sharp antithesis to this broad class of "prisoners of war"), as "such other persons as may be designated by the Secretary of War." *It is these* "*other persons*" *alone* who are classed with the "enlisted men" and forced into the steerage at third-class rates by the terms of the contract.

It is at once seen that this preliminary analysis and view of the contract, considered in the light of the situation of the parties, presents a perfectly consistent and reasonable idea and scheme in harmony with what must have been the intent of the parties.

On the other hand, the narrow view of the Government, to the effect that the incorporation of the words "other persons," following the words "enlisted men," shows an intention to include the "wives and children" of "officers" with the "enlisted men" as persons entitled only to *steerage accommodation*, who were to be carried at third-class rates, is so utterly at war with the expressed intention of the parties, to give, as the contract provides, "*safe and comfortable* transportation" to such persons, and is so clearly unjust and absurd, and so violates the humanities, in assuming that the parties intended, on the one side, to force such women and children into the filth of the steerage, and thus separate and divorce them from their husbands and fathers, during a thirty-two days voyage in the tropics, and, on the other, to force the appellants to carry such persons, who must naturally and consistently receive cabin accommodation, at third-class rates, that it must be wholly rejected as involving an absolute subordination of all reason and sense to the alleged letter of an instrument, which, plainly, if so limited, could not possibly be made to satisfy the intention of the parties.

Moreover, it appears, that this assumed construction by the Government of the terms "other persons," as including "wives and children" of "officers," is absolutely forced, and is at war with the very words of the contract itself. Apart, therefore, from its inherent unreasonableness and injustice, it must, for this reason alone, be summarily rejected.

Recurring, now, for a demonstration of this last proposition, to a more detailed analysis of the contract (Rec., pp. 30-32), we find that, after reciting the treaty, the proposal, and the purpose of the contract to secure the transportation of the Spanish

"prisoners of war," "as are designated in the terms of the treaty of peace," the instrument declares that Ceballos & Company agree to furnish "good and safe" transportation—

> "for such number of *prisoners of war* AND *persons as may be designated by the Secretary of War.*"

Here we find the first distinction made between the "prisoners of war," who were absolutely entitled to transportation under the treaty, and the *additional* class, "*persons as may be designated.*"

In the next paragraph, Ceballos & Company agree that, for this purpose, they will provide a sufficient number of steamships for the "safe and comfortable transportation" of the—

> "*prisoners of war* AND *such other persons as may be designated by the Secretary of War.*"

Thus the classification between "prisoners of war," on the one hand, covered by the treaty, and on the other the additional class of "such other persons as may be designated"—included for the purpose of giving the Secretary of War an ample discretion in ridding the islands of obnoxious persons—is even more clearly emphasized.

In this same paragraph, immediately after this clause, the contract proceeds to provide for the accommodations to be furnished, and we find that the "prisoners of war" are plainly divided into "*officers,*" for whom cabin accommodations are set apart, and "*enlisted men,*" for whom third-class or steerage accommodations are provided. The class of "*such other persons as may be designated by the Secretary of War*" is then *grouped, with respect to accommodation, with the "enlisted men,"* the clause, as a whole, reading as follows:

> "The said Company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the

> safe and comfortable transportation of the *prisoners of war* AND *such other persons as may be designated by the Secretary of War*, with cabin accommodations for all officers, and third-class or steerage accommodations, space and ventilation for the enlisted men AND *other persons* on board each ship" (Rec., p. 31).

Throughout the contract, as here, there is no other antecedent to which to refer the last repeated words "other persons," except the immediately preceding clause in the same paragraph in which the identical words are used; that is to say, "such other persons as may be designated by the Secretary of War," or, as in the immediately preceding paragraph, "and persons as may be designated by the Secretary of War." The immediately following paragraph makes provision for the completion of the embarkation not later than May 1st, 1899, of "the *prisoners of war* AND *other persons.*"

Immediately following this last paragraph, however, we come to that which provides for the *compensation* to the appellants for the service to be rendered, and we find that this paragraph is even more specific, in point of definition, than those which have preceded, and, relating, as it does, to the subject of compensation, which is the point now at issue, it is quite conclusive. That clause (Rec., p. 31) declares that, in consideration of the faithful performance of the foregoing provisions of the contract, there shall be paid to Ceballos & Company for——

> "Each *commissioned officer*, the sum of two hundred and fifteen dollars ($215) and for each *enlisted man, private soldier*, OR *other person designated by the Secretary of War for transportation*, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said *officers, enlisted men* OR *persons* have been transported, subsisted and delivered on shore in Spain."

Following this paragraph comes a provision gov erning the delivery by the United States of the persons to be carried, which provides as follows (Rec. p. 31):

> "It is further agreed that the *prisoners of war* AND *all other persons to be transported* shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War—"

within certain limits of time, which the contract specifies. It would be impossible to outline more clearly than do the words of the contract itself, in these last two clauses, the distinction between "*prisoners of war*," on the one hand, AND "*other persons designated by the Secretary of War for transportation*," or, as otherwise expressed, "*all other persons to be transported*," on the other. It is evident that these latter words, in each instance, define *the entirely separate and distinct class* previously referred to in the contract. There are, first, the "*prisoners of war*" (plainly divided into the classes, "commissioned officers" and "enlisted men" or "private soldiers"), and then, secondly, "ALL OTHER *persons* to be transported," or "designated by the Secretary of War for transportation."

The final clause, in respect to the count and computation of persons carried, as the basis of payment, refers to the "number of officers, enlisted men, OR *other persons*," and to the "number of officers, enlisted men AND *persons* counted on each ship." Here, finally, in the contract, we find the distinction more specifically made, not between "prisoners of war" treated generally on the one hand, and on the other, "all other persons," but between the classes into which the general class, "prisoners of war," has been divided, that is to say, between "officers" and "enlisted men," on the one side, and the other class, called "persons," and

otherwise defined *by the contract itself*, in the same connection as "*persons designated by the Secretary of War*," on the other.

Thus, it appears, from these detailed references to the very *letter* of the contract, that it was the plain intention of the parties—and no argumentative exposition can make it plainer—to provide for the transportation of two distinct groups, the one called "prisoners of war," or otherwise divided into "officers" and "enlisted men," and the other called "all other persons to be transported," who in both the compensation clause of the contract and that which specifies the accommodation to be afforded, are each time defined as "*such other persons as may be designated by the Secretary of War*," or "*other persons designated by the Secretary of War for transportation*."

But we must remember that the treaty itself has provided, in Article VI, that "*all persons* made prisoners of war," are to be returned to Spain at the cost of the United States, and we find it conclusively adjudged, as a fact, that among these "*persons* made *prisoners of war*" were the "*families*" the problem of whose repatriation was expressly referred to Washington (Finding II, Rec., p. 26), or, as otherwise expressed, the "*wives and children*" of the "officers" and "enlisted men," and also "nurses," "nuns" and "sisters of charity and lady pensioners" (Finding IV, Rec., p. 27), and, as to these, we are told that "the United States *treated all* of these classes *as prisoners of war*," with "supreme control of them," "until they were delivered aboard plaintiff's ships for transportation."

Obviously, therefore, when this contract provided for the transportation of "*prisoners of war*," as one class, *it was referring to these very people thus described and treated by the United States as such* "*prisoners of war*," and when, to cover the contingencies of the then existing situation, treated as an "emergency," it referred to, "*such other persons as*

may be designated by the Secretary of War," or, as otherwise phrased in the contract, "*all other persons* to be transported," it was providing for *a totally distinct, and, as it were, supplemental class,* for whose accommodation and transportation it was also necessary to make specific provision in the contract. To be sure, these "other persons to be transported," and thus "designated"—presumably the riff-raff and flotsam and jetsam of Spain's population—were grouped with "enlisted men," for the purpose of defining both their accommodation and the price to be paid therefor, but it is too clear to require further comment that they were not grouped with these "enlisted men" as part of the "prisoners of war," but *as an entirely different class of people,* whose transportation, for good reasons, the Secretary of War desired to provide for.

From this examination of the letter of the contract, it is also manifest that all the persons who were classed and were, in fact, "treated" by the United States "as *prisoners of war," required no designation whatever by the Secretary of War.* It was only these "other persons to be transported" *whom it was necessary that he should designate* in order to secure their transportation. And it appears that the "families"—"wives and children"—with other women specifically described, were *all classed and "treated" by the United States as "prisoners of war"* (Finding IV, Rec., p. 27). That was a matter absolutely *settled before either the oral or written contract was made. No designation as to them,* therefore, was required on the part of the Secretary of War. *They were not "such other persons as may be designated." They were described, and were to be carried, as "prisoners of war,"* and the requirement of the Secretary's *designation was, as we have said, limited solely to "all other* persons to be transported"—that is (as is plainly apparent from

the contract as a whole, and particularly from the paragraphs relating to accommodation, compensation, and delivery aboard ship) *other than "prisoners of war,"* the class, "prisoners of war," being already sufficiently defined by their treatment and classification as such by the United States.

If, then, we inquire, by process of elimination, who were to be carried in the cabins at first-class rates, we find the definition and specification in the very language of the contract, which declared that the appellants should be paid for "each enlisted man, private soldier, OR *other person designated by the Secretary of War for transportation* the sum of seventy-three dollars and seventy-five cents ($73.75)." These were the *only persons to be carried at third-class rates.*

It, therefore, follows that all others were to be carried at cabin rates. It cannot be said that officers' "families"—"wives and children"—are included among "such other persons," *because "the United States treated all of these* classes *as prisoners of war,"* and the contract makes this plain distinction between "prisoners of war" and "such other persons as may be designated by the Secretary of War." Finding, therefore, that the *only "prisoners of war"* carried at *third*-class rates in the *steerage* were the "*enlisted men*" or "*private soldiers,*" if we also find, as we do on referring to Finding IV, that among the "prisoners of war" were, with others, the "*families*" *and* "*wives and children*" of "officers," *the only possible inference is that they were to be carried at the only other,* or *cabin, rate.* We are not dealing with the question of the "enlisted men," although it is equally clear that the "wives and children" of "enlisted men" were also "prisoners" following their husbands and fathers, naturally, into the steerage. In short, the only provision in the contract as to "prisoners of war," in this respect, declares that the "enlisted men" and "private soldiers" (presumably with their own

"wives and children," also "prisoners of war") are to be carried at third-class rates. All other "*prisoners of war*," consequently, went at cabin rates.

If (and such is the fact), "the United States *treated all* of these classes *as prisoners of war*," that is to say, these "wives and children," these "families" of "officers," then, by the *terms* of the treaty as well as by those of the contract itself, they were entitled, *as such* "*prisoners of war*," to be returned to Spain, and the United States so provided. They were all to be carried in the appellants' ships. There can be no doubt as to that. And there were *only two classes of rates of compensation* to be applied. (See 23 Opin. Atty.-Genl., at p. 18; Opin. below, Rec., p. 46). *If, therefore, they were not* (and we have shown that they clearly were not) *included in the third-class rates, their transportation must be included within the cabin rates,* under the designation "officers." This latter term, it thus appears, *is simply another term for first-class accommodation.* These classes of persons, thus treated by the United States as "prisoners of war," cannot be excluded. That is plain. And it is equally plain that they are not included among those carried at third-class rates, as "enlisted men," or "private soldiers," or "such *other* persons as may be designated by the Secretary of War for transportation"—the latter including, as the contract clearly defines it, *only* "*all* OTHER *persons to be transported,*" that is, *other than* "*prisoners of war.*" These latter, as we have seen, require no designation. As, therefore, these "wives and children" as "prisoners of war" *must* be carried, it is plain that they must go where they naturally belong—in the cabins, with their husbands and fathers, at cabin rates.

And *such*, it appears, was *the consistent and uniform practice of the parties under all three contracts*—the *Cuban*, the *Philippines oral*, and the *Philipines written*, contracts.

Thus, merely by reference to the *terms* of the contract itself, the whole weakness and futility of the contention of the Government and of the court below are exposed—for that contention rested solely on the proposition that "wives and children" could not be carried except as "*other persons*," and, *therefore*, at *third*-class rates.

At this point—in connection with the grouping of their "wives and children" with the "officers"—the illustrations, hereinbefore referred to, of the similar construction of special words, should be borne in mind. It has been held, as we have seen, that "*child*" may include "*grandchildren*"; "*single women*" may include "*married women*"; "subscribing witness", the *husband* of such witness; "administrator", administrator *de bonis non;* etc.

The surrounding circumstances also compel rejection of Government's contention as unreasonable and violative of intention.

As fortifying this contention as to the manifest intention of the parties, drawn from the *terms* of the contract, there are certain other conclusive circumstances, in the relations and situation of the parties, which may be briefly referred to.

*The Government knew in advance that the "families"—whom it "treated * * * as prisoners of war"—had to be transported* (Findings II and IV, Rec., pp. 26–27). It will be remembered that, by the terms of the capitulation, in *August*, 1898, "all questions relating to the *repatriation* of officers" "*and of their families*," and to the "*expenses*" relating thereto, were "*referred to the Government of the United States at Washington*" (Finding II, Rec., p. 26), and the treaty provided for the return of "*all persons* made prisoners of war."

The contract, in terms, provides that Ceballos & Company shall furnish "*good and safe* transportation," and shall provide a sufficient number of

steamships for the "*safe and comfortable* transportation" of the persons to be carried. In the case of the "families"—the "wives and children"—of "officers," it is evident that such "*safe and comfortable* transportation" could not possibly be had in the steerage.

The voyage from the Philippines to Spain, as the Court must know as a matter of general knowledge and judicial notice, *occupies about thirty-two days*, and is, throughout, *in the midst of the heat of the tropics.*

As emphasizing the assumed effect of tropical conditions, the bid tendered to the Quartermaster-General for this contract by the appellants, in reply to his advertisement, sets forth that—

> "It is proposed not to load the steamers beyond two-thirds their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary, owing to climatic conditions and length of voyage" (Rec., pp. 29-30).

The contract on this particular point also provides that—

> "The Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to" (Rec., p. 31).

The "wives and children" of "officers," both civil and military, were, presumably, of gentle breeding and refinement, and were doubtless, many of them, persons of a high degree of rank and culture. Spain, it will not be forgotten, is a monarchy of the old school, in which there persist, even to-day, with startling emphasis, the ancient aristocratic distinctions of rank between the different classes of the population. Many of the Philippines civil and military officials, it is well known, were persons of rank and distinction. Spain had been in occupation of the islands for centuries, and, that long

occupation now being brought to an end, the whole civil and governmental establishment—not merely the army of occupation—was to be returned to the mother country as "prisoners of war" There was the necessary accumulation, as a part of the ancient, aristocratic régime, of many officials, civil and military, of aristocratic rank, with their families. It might well have been that members of the royal family or household might have been caught in this predicament at Manila. Their situation would have been precisely the same as that of the President of the United States and his family placed in similar circumstances.

"*Safe and comfortable* transportation" *for such persons* certainly requires that they should be carried *in the cabins with the officers, their husbands and fathers.* If they were not to becarried in the steerage, but in the cabins, then, certainly, in reason and common sense, their "safe and comfortable transportation" was to be paid for at the rate which such accommodation commanded, that is to say, the cabin, or first-class, rate.

So, too, as we have heretofore intimated, *it is absolutely unreasonable to impute to the parties an intention to separate and divorce husbands and fathers, the "officers" in question, from their "wives and children."* In other words, where the "officers" were carried, there we must assume that the parties intended that their "wives and children" should be carried also. *It could not have been intended needlessly to separate families,* on this long, hot and dangerous voyage, especially familes who were being carried to their *homes* in Spain. We may take it for granted that accommodations were dependent upon station in life and standard of living; that the dictates of humanity and the usages of civilized society were to prevail; and that, if the father and husband was to be carried in the cabins, there it was intended that his wife and his children should follow him. So, again, if the husband and father was an "enlisted man," to be car-

ried in the steerage, there, obviously, it was the intention that his wife and his children should likewise follow him.

The Government's contention necessarily involves such an imputation of intention thus to separate families, placing the more delicate and sensitive members, "the wives and children," in the steerage, in violation of all known usages and of all human feelings, and the husbands and fathers in the cabins. As we have said, this is wholly unreasonable and unnatural, especially in view of the character of the voyage in question, and the quantity of filth, and the utter degradation of the personal associations, in the average steerage accommodations.

In any event, the Government's contention involves the suggestion that the parties intended that, if the appellants saw fit (because it is said that the Government did not intervene, or "*assign*" accommodations—Finding X, Rec., p. 32) to carry "wives and children" in the cabins, that was purely an affair of the appellants, for they must have understood that they could charge for such accommodation *only the third-class rate*. But, equally with the former suggestion, it is also unreasonable to impute such an extraordinary intention to the parties, to request, on the one hand, and to charge, on the other, only a third-class rate for what the parties must have known would be the first-class accommodation required to be furnished.

On this head, too, it will be seen at once that the only possible reasonable basis (which is utterly lacking here) for this argument or suggestion on the part of the Government, involving this assumption of an intention to give first-class accommodation to the "wives and children" for a third-class rate, must be found in an assumed *knowledge* on the part of the appellants of the *number* of "wives and children" thus to be carried, for, in that event, with such preliminary knowledge of the numbers, it

might perhaps, with some propriety, if not much force, be contended (see Opinion below, Rec., p. 46) that Ceballos & Company might naturally have counted upon a wholesale profit on the whole transaction, and have assumed from actual computation that it would be sufficient in amount to enable them thus to carry—as a mere incident and at the lower rate—these "wives and children" in the cabins with the "officers," their fathers and husbands. But, inasmuch as there is, as we have said, *no basis of fact for this contention* (it nowhere appears that the numbers were known, and, in fact, the total number, even of *soldiers*, who were "prisoners of war," was only approximated, Rec., pp. 28–29, 38), the argument falls to the ground.

In the performance of the contract—both oral and written—the "wives and children" were actually included by the United States, and it cannot now complain.

In point of fact, it appears that—

> "In performing the obligations of their contract, the petitioners supplied vessels with cabin accommodations and steerage accommodations as had been agreed, *and in the cabins were carried the officers, civil and military, with their respective* FAMILIES, *and in the steerage, the enlisted men and their* FAMILIES, *and other persons entitled to third-class passage*" (Finding X, Rec., p. 32).

And, as we have pointed out, it appears that the *Government thus knew* they were so being carried, *under the oral agreement, before the written contract* (Findings, II, IV, V, VI, X and XI).

The Court of Claims then proceeded to make the utterly immaterial, and, as it seems to us, the wholly unnecessary declaration (We are claiming upon an *express contract*) that—

> "*It does not appear* from the evidence in the cause that the United States assigned

> or designated cabin accommodations for the commissioned officers, or the wives and children of the commissioned officers. The evidence does establish to the satisfaction of the Court that when the wives and children of the military and civil officers of the Spanish Army in the Philippine Archipelago went on board the plaintiffs' vessels, the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates" (Finding X, Rec., p. 32).

Why should they? The contract, after stating the amount to be paid for each person transported, provides:

> "The said sums to be due and payable *upon evidence* that said officers, enlisted men, or persons have been transported, subsisted and *delivered on shore in Spain*" (Rec., p. 31, Finding IX).

The appellants were themselves in New York, and in accordance with their contract had—

> "supplied vessels with cabin accommodations and steerage accommodations as had been agreed, and in the cabins were carried the officers, civil and military, *with their respective families*" (Rec., p. 32, Finding X).

In the requisition issued by the Quartermaster at Manila upon Ceballos & Company for transportation of these prisoners and other persons, it is specifically stated that:

> "Payment for this service will be made *in Washington, D. C.*, U. S. A., at the office of the Quartermaster-General of the Army" (Rec., p. 36, Finding XV).

It will be noted that in this requisition, which is a specimen of those issued by the Quartermaster at Manila, accommodations are called for—

> "10 commissioned officers,
> 258 enlisted men,
> 3 civilian officials,
> 8 *wives of officers and officials,*
> 3 *children under 3 years of age,*" etc.

And now it is claimed that, after the United States had solemnly agreed by treaty with Spain (as interpreted by the United States) to deliver these officers and their *families* in Spain, and after the United States had entered into a contract with the appellants to furnish the vessels to enable this Government to perform this obligation to a sister Nation, and after it had been stipulated in the contract that payment was to be made to the appellants *when* "*evidence*" was furnished that these persons had been transported, *subsisted and delivered on shore in Spain*, and after the written requisition, issued by the Quartermaster at Manilla upon these appellants for accommodations aboard ship, had specifically stated that the "*payment for this service*" rendered by the appellants "*will be made in Washington*, D. C., U. S. A., at the office of the Quartermaster-General of the Army" (Rec., p. 36), the United States will not pay for the service that it actually received, for the reason, forsooth, that the appellants did not, at the time of the *embarkation* of the prisoners, *make claim* against the United States for the service that the Government had accepted and received, and specifically arranged to pay for.

It must not be forgotten that the obligation of the appellants was to furnish to the United States vessels with sufficient cabin accommodations and sufficient steerage accommodations to enable the United States to carry out in good faith its agreement with Spain. *The appellants had nothing whatever to do with determining who were "prisoners of war," or who were "other persons designated by the Secretary of War." Their sole duty was to furnish a sufficient number of vessels, with sufficient accommodations*, and to furnish subsistence on the voyage, for all persons placed aboard by the authorities of the United States, to land these persons in Spain, and, after that was all done, to present their bill *at Washington* for payment. They were under *no obligation* whatever to demand,

in the Philippine Islands, payment for any person delivered aboard ship, and, if they had done so, they would doubtless have had their attention called sharply to the terms of the contract, which provided for payment *after* these parties had been "*delivered on shore in Spain.*" The appellants were *utterly powerless in respect to the selection of persons*, and were absolutely entitled to be paid for all persons whom the United States tendered or "delivered" for transportation.

All this the Government, speaking by its Attorney-General, *ante litem motam*, long ago admitted, saying:

> "It is entirely certain that, under this contract, J. M. Ceballos & Co. had *no control over, or anything whatever to do with, determining what persons, or how many*, should be thus received, subsisted and transported, *nor in determining the class of such persons*, as soldiers or civilians, *nor in determining whether the persons so tendered for transportation came within any of the classes described in the treaty of Paris. The authorities of the United States only were authorized to decide this*, and with their decision this steamship company had nothing to do, but was *bound to receive and transport all who were thus tendered*, and if that company has performed this service under this contract, *the payment therefor cannot be made to depend upon the wisdom or correctness of the decision.*"
>
> 23 Opin. Atty.-Genl., at p. 15.

Again:

> "*It rested alone with the United States authorities to say who should be taken* as prisoners, and as to which *the carrier had neither voice, knowledge nor means of knowledge.* but was, by the express terms of his agreement, *bound to carry all who were designated and tendered.* When one contracting party *requires* of the other more than should be required, but *which the other is bound to do, if*

> *required, and does it, it would be a novel rule which would permit the first party to refuse payment upon the ground that he ought not to have required so much.*"
>
> 23 Opin. Atty. Genl., at p. 17.

And after referring again to the conclusiveness of the determination made by the United States, as to the persons to be carried, the learned Attorney General repeated that (p. 17)—

> "*having done this by its authorized agents, and compelled the carrier to accept such decision and perform the service thus required, it does not lie with the United States now to refuse payment upon the ground that it or its agents were mistaken and required more than they should have done.*"

It should be borne in mind that the Court has also found, with reference to these "prisoners of war," that the United States—

> "*had supreme control of them after the surrender of Manilla until they were delivered aboard plaintiffs' ships for transportation, at which time the supervision of the United States ceased*" (Finding IV, Rec., p. 27).

And it appears from the contract itself that they were to be "*delivered by the United States on board the ships*" (Rec., p. 31).

It seems to us to be a most unworthy argument to suggest that, because the United States did not specifically assign accommodations, it is not bound to pay therefor under an *express contract* like that in question. We are *not* suing upon a *quantum meruit*. It does appear, however, that the United States had "*supreme control*" and general "*supervision*" over the persons to be carried and actually "*delivered*" them aboard ship. In view of the *terms of the contract*, it was, of course, quite unnecessary for the appellants to make any claim in respect to "wives and children," when they were

taken aboard ship. They naturally placed them where they belonged, that is, with the "officers," their husbands and fathers.

It is also true that *the mere tender and delivery* by the United States, for transportation as "prisoners of war," of persons classed as "*wives and children*" *of* "*officers*," *amounted in itself* not merely under the suggestion of the humanities, and in view of the general usage and understanding of civilized society on the subject, but also in view of what must naturally and reasonably be deemed to have been in the minds of the parties, to a *suggestion and requisition* of the only "safe and comfortable transportation" which could be given to *that class* of persons, that is to say, *cabin accommodation. The mere description of the persons and of their station in life*, in short, was the full equivalent of an affirmative assignment by the United States of such persons to such *cabin accommodations.*

The appellants merely furnished accommodations. They knew nothing of the character of the passengers. *The United States alone could know the rank and character of its prisoners and of the other designated passengers.* Accordingly, *when the United States* "*delivered*" *the passengers* "*aboard plaintiffs' ships*," *it in effect assigned accommodations* by the mere act of description.

Rather, it may be said that, if such "wives and children" were *not* to be carried in the *cabins*, it would have been incumbent on the United States to make an affirmative assignment to other quarters. Lacking such absolute negation on the part of the United States of the *natural* accommodation in the cabins for such persons, it was the natural, proper and reasonable course for the appellants to place them there with their husbands and fathers.

Even when it came to formal requisitions for transportation made by the United States upon the appellants, it appears (Finding XV, Rec., p. 36), that the number of "*wives of officers and officials*" and the number of "*children*" were expressly set

forth. As we have pointed out, the only inference from such a requisition, operating as the tender and delivery for transportation of such persons, was that they should be carried with their husbands and fathers. Cabin accommodation alone was indicated by the *mere description of the persons.*

In reason and common sense, therefore, it is inconceivable that, in requesting transportation for, and supervising the delivery to the appellants of, such "wives and children," the United States did not intend that they should have the only "safe and comfortable transportation" possible under the circumstances, that is to say, in the cabins where alone the family could be, and travel, together.

This is the natural, reasonable and just construction.

Strengthened, as we are, by these general considerations, the conclusion is irresistible, that, in using the broad term "officers," on the one hand, and "enlisted men" or "private soldiers," on the other, the parties intended to classify *all* of the "*prisoners of war*" in accordance with the classification made by nature and civilized society, with reference to their station in life—thus preserving the integrity of families, and giving to these "wives and children" the same accommodation furnished to the "officers," their husbands and fathers—from which it follows, as the only sensible and reasonable construction (for any other, on the face of this record, would lead to absurd, unnatural and most unjust results) that such accommodation, thus provided, was to be paid for at the first-class rates prescribed therefor. In this way, the general terms of the contract (substantially the same in that respect as those employed in the Cuban contract on the same subject) are effectively applied to the subject-matter, and, the classification of "such other persons as may be designated by the Secretary of War" being laid aside as wholly inapplicable to the

transportation of "*prisoners of war*," among whom these "wives and children" were classified by the United States, we are left free to work out the only sensible, natural and reasonable construction which can possibly be placed upon this instrument, to the effect, that is to say, that, in providing for accommodation and payment for the "officers," the "wives and children" of such officers were, under the circumstances, necessarily included.

This is the only construction which accords with reason and common sense, and which is consistent with the circumstances and relations of the parties. It is the only construction which avoids the imputation of an unreasonable and unnatural intention to the parties in respect to the nature of the accommodation to be furnished. It likewise avoids the unjust and unnatural suggestion that payment for such accommodation, whatever its nature, was to be made only at third-class rates. As avoiding absurdity and injustice, and as the only reasonable construction which the surrounding circumstances permit, it must be accepted.

Practical Construction under both the Cuban and the original oral Philippines Contracts. No doubt or question raised thereunder.

Beyond this, however, it clearly appears, as we have seen, that the Cuban contract, involving the use of the same terms in this respect, and the original *oral* Philippines agreement, were both practically treated by the parties as requiring the transportation of the "wives and children" of "officers" in the cabins, and as further requiring the payment therefor by the Government at first-class rates. Thus the parties construed the contract in practice.

It must be borne in mind that *no question or contest* was made by the United States in respect to this *Cuban* contract. There was *no controversy* between the parties as to the use or meaning of these

words "*officers*," or as to whether they included their "*wives and children*." There was, therefore, *no mischief or evil to be remedied in that respect, when it came* to phrasing the subsequent Philippines contract. Accordingly, we find that the parties naturally expected, and in fact made, the same classification of prisoners, as between "officers," on the one hand, and "enlisted men" or "private soldiers," on the other, which was adopted in the earlier Cuban contract. From the practice under that contract, no reason appears why the parties should have changed the earlier phraseology. We have already explained that the *addition* of the *new class* of persons to be carried, described as "*such other persons as may be designated by the Secretary of War*," was doubtless considered necessary because of the peculiar condition of affairs in the Philippines, and the "emergency" which had arisen there for the quick return to Spain of the Spanish prisoners and for *ridding those islands of all Spanish influences.*

We have also already pointed out that the Cuban contract related to precisely the same subject-matter, that is to say, the return to Spain of the Spanish prisoners under Article VI of the Treaty, and was an agreement between the same parties, thus covering the same general transaction. It was to all intents and purposes the same agreement concerning the return to Spain of "all persons made prisoners of war," whether in Cuba or the Philippines. Having thus been practically construed by the parties, and a further contract, with reference to the Philippines, having been made *on the footing and faith of the practical construction of the earlier contract*, it does not lie in the mouth of the United States, now, to question a construction thus conclusively established by its own deliberate action. Indeed, it may be said that it was because of that practical construction of the Cuban contract that the similar general expressions were employed in the Philippines contract. This

action of the parties must certainly be treated as controlling and conclusive in the case at bar.

Opinion of Attorney General.

Brief comment should be made, at this point, on the Attorney General's opinion with reference to this contract.

See 23 Opinions of Attorney General, 9, at pages 14–15 and 17–18.

In that opinion, the learned Attorney General, while admitting and stating, as we have pointed out that the United States might at its pleasure designate for transporation, and call upon the appellants to transport, any persons whom it might wish to return to Spain, assumed that all such persons must nevertheless be treated, and would thereby be treated, as "prisoners of war." He thus failed to make the true distinction, so clearly apparent on the face of each paragraph of the agreement, between "*prisoners of war*" on the one hand, and "*such other persons as may be designated by the Secretary of War,*" on the other. Failing in this distinction, the learned Attorney General missed the whole point in controversy. He simply *assumed* and stated that "wives and children" *might properly* be treated by the Secretary of War, at his pleasure, as "prisoners of war." *He did not know* at that time that it was *the fact* that actually "the United States *treated all* of these classes *as prisoners of war*" (Finding IV, Rec., p. 27). That fact is now adjudged by the findings of the Court below, and what the learned Attorney General treated merely as a possible assumption, or (see p. 16 of Opinion) as "questionable," that is to say, "whether all the persons tendered and transported were not within the purview of the Treaty, at least under such a liberal construction as the United States might, under the circumstances, well adopt," it now

appears, under the judgment of the Court of Claims, was not at all questionable, but was, on the contrary, an ascertained fact, definitely accepted; that is to say, with reference to *such "wives and children"* and other persons mentioned, "the United States *treated all* of these classes as "*prisoners of war.*"

Not having this crucial and adjudicated fact before him, and failing, in his analysis of the contract, to note the provision for the additional class of "*such other persons as may be designated by the Secretary of War,*" the learned Attorney General, in order to provide a rule of compensation by which the Secretary of War might be governed in his relations with the appellants, was forced to construe the words, "other persons" (which he seems to have been misled into taking out of the contract, without any regard whatever to their context or antecedents) as covering and including the "wives and children" in question; *whereas, by this finding of fact, it appears* that they are covered and provided for, *not as "such other persons* as may be designated," *but, in fact, as "prisoners of war"—the class for whose transportation both the Treaty and the contract primarily provide.*

Treating the "wives and children," however, as he did, merely as such "other persons," he found himself, as he conceived, compelled to group them with "enlisted men," and arbitrarily found no rule of compensation other than the third-class rate. He did not, it will be observed, enter upon any of the general considerations or arguments which we have advanced with reference to the unreasonableness, injustice and impropriety of such a construction of the contract, because involving the transportation of persons, who were naturally first-class passengers, in the third-class accommodations at third-class raes, but merely, without referring to any such considerations, and at the close of his long opinion, hastily slurred over the final question of compensation, by holding that the Secretary of War, under the classification "other persons," was *justified* in

paying to the appellants, for the transportation in question of such "wives and children," the *third-class rate* prescribed.

In this respect the Government and the Court below merely repeat the assertions of the learned Attorney-General, and, in so doing, deliberately ignore the actual phraseology and context of the contract, as we have shown in so great detail, as well as the general considerations derived from the surrounding circumstances, the practice of the parties, and the dictates of reason, common sense and justice, on which, in such cases, full stress must be laid.

Certain unimportant and immaterial findings of the Court below.

The Court of Claims saw fit, for reasons doubtless satisfactory to itself, to incorporate in its findings the statement that the *Steamship Company*, whose ships were employed to carry these Spanish prisoners, which had a long pre-existing contract with the Spanish Government for the return of persons, including officials and their families, from Spanish colonies to Spain, actually—

> "sent to the *Spanish Government* its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit, and the sums for which suit is now brought against the United States herein have all been settled and paid *by the Spanish Government* to the Compañía Transatlántica in Spain. *It does not appear* that the claimants, Ceballos & Co. have been obliged to pay the balances for which this action is brought, or any of said balances, to said Compañía Transatlántica, or that plaintiffs have incurred any liability therefor" (Rec., p. 26).

The absolute immateriality of this finding is apparent on its face. The appellants were powerless

to prevent its introductien, and there is no bill of exceptions running from the Court of Claims to this Court. The appellants were, of course, under no obligation in this case to explain their wholly independent relations with the Spanish Steamship Company in question, or with the Spanish Government. This is an action upon *an express contract with the United States.*

The suggestion of the finding is so utterly immaterial as to constitute a serious judicial error, which, unfortunately, the appellants, as we have said, were and are powerless to remedy. The appellants were not trying in the Court of Claims, and they could not there, and cannot here, be called upon to explain their relations with either the Steamship Company or the Spanish Government. If the Spanish Government has paid the Steamship Company, *non constat* but what it has *paid for the honor* of the appellants and, through them, of the United States, in view of the shocking injustice to which the appellants have been subjected; for, presumably, what they did not receive they could not pay to the Steamship Company. Certainly, the *United States*, after agreeing by *treaty* to provide this transportation "*at its own cost,*" will not now contend that *Spain* either could or should discharge that obligation. Accordingly, even if Spain had in fact paid for the transportation, *the independent contractual obligation of the United States to these appellants has not been discharged, or in any way affected thereby.*

As the finding puts it:

> "*It does not appear* that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is brought * * * or that plaintiffs have incurred any liability therefor."

It might better have been said, as we may say, on the contrary, that *it does not appear that* the appellants *may* NOT *be compelled* to pay the entire

balance for which recovery is sought in this suit. Both suggestions, however, are wholly immaterial, and must be disregarded in a consideration of the rights and interests of the parties under the provisions of this *express contract* now in suit.

Equally out of place and immaterial, under this *express contract*, were the findings that the United States did not assign accommodations; that the appellants did not make claim for such first-class rates when the wives and children went aboard ship (Finding X, Rec., p. 32); and that the same ships carried other passengers in addition to those carried for the United States (Finding XVIII, Rec., p. 38).

With these observations we dismiss this particular matter from further consideration.

SECOND POINT.

The Court below erred in refusing to allow the claim for 198 persons actually carried to Spain, merely because, as the Court erroneously assumed, they were not represented by so-called Quartermaster's requisitions.

The Court of Claims denied payment to the appellants for the 198 persons transported in the last fifteen shipments of prisoners and other persons from Manila to Spain, referring to them (Rec., p.35) as:

> "Making 198 persons in all, whose passages were not allowed for by the Auditor of the War Department, for the reason that they were not included in requests for transportation."

Again the Court states (Rec., p. 36):

> "The 198 persons now claimed for were not included in the count at *the time and place of embarkation.*"

And again (Rec., p. 37):

> "The evidence does not establish to the satisfaction of the Court that these 198 persons certified to by the American Consul at Barcelona were *prisoners of war*, entitled to transportation under the contract."

These three quotations state the grounds upon which the Court declines payment for the 198 persons.

The appellants insist that they are entitled to payment for these persons, for the reason that the Court has found that they were actually transported to Spain. It is utterly immaterial whether or not they were included in the count at the *time and place of embarkation*, and it is not for the *Court* to determine whether these persons were *entitled* to transportation under the contract. They were, in fact, transported by the appellants.

That these 198 persons were really transported from the Philippines to Spain is clear from the record. In Finding XV (Rec., p. 34), the Court says:

> "Of the last fifteen shipments of prisoners of war, running from Feb. 20, 1900, up to July 14, 1901, the list of passengers *shipped as shown by requests for transportation and Quartermaster's requisitions* (based on requests from the Spanish authorities) is as follows":

The Court then *specifies the number* of military officers, civil officials, etc., and gives a *total of 1,971* (R., 35). The Court further specifies (Rec., p. 35) that 184 of these are officers at $215 each, and 1,589 enlisted men at $73.75 each, making a total of 1,773, and states that the Auditor for the War Department made allowances for these 1,773 and disallowed payment for the 198 persons, because the Auditor for the War Department decided that they were not included in the requests for transportation. *The Court, however, disagreeing with the Auditor, has distinctly found, as shown by the above quotation, that they*

WERE INCLUDED, "as shown by requests for transportation and Quartermaster's requisitions," and the Court *finds the total of the number included in such requests for transportation and Quartermaster's requisitions at 1,971* (Rec., p. 35). *By adding 198, the number in controversy, to the 1,773 allowed by the Auditor* for the War Department, we have a total of *1,971*, which is *exactly the same total as the Court finds were included in the "requests for transportation and Quartermaster's requisitions* (based on requests from the Spanish authorities)" (Finding XV, Rec., p. 34).

The further statement made by the Court that—

> "The 198 persons now claimed for were not included in the count *at the time and place of embarkation*" (Rec., p. 36)—

is of no force and effect, in view of the fact that the Court had already ascertained and found as a fact that the method of counting the persons transported by the contract, to wit, by a representative of the United States and a representative of Ceballos & Company (Rec., p. 32), had been abandoned and superseded, and that—

> "The method of counting prisoners entitled to transportation under the contract was *changed* as to the last fifteen shipments, so that requests for transportation with reference to available space should be made upon the plaintiffs" (Rec., pp 35-36).

Clearly, therefore, it is of no moment whether or not these 198 persons were counted "at the time and place of embarkation," in view of the fact that the mode of counting prisoners entitled to transportation under the contract had been *changed* as to the last fifteen shipments, so that the number was to be ascertained by the "requisitions issued by the Quartermaster."

The last statement made by the Court (Rec., p. 37), to wit:

> "The evidence does not establish to the satisfaction of the *Court* that these 198 per-

> sons * * * were prisoners of war entitled to transportation under the contract"—

is wholly immaterial, in view of the fact that the Attorney-General, upon an official request from the Secretary of War, had decided—

> "That as between the contracting parties it *rested alone with the United States* to say who it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract" (Rec., p. 33, Finding XII).

Manifestly, therefore, it is not a question as to whether the *Court of Claims* is satisfied that these 198 persons were entitled to transportation under the contract. That question was not before the Court. That was *a matter for the United States authorities* at Manila to determine at the time they issued their requisitions for transportation upon Ceballos & Company, and Ceballos & Company were in such a position that they could not refuse to transport any person or persons tendered to them by the United States.

In the same opinion of the Attorney-General, officially given to the Secretary of War, it was held—

> "That it was questionable whether all the persons tendered and transported were not within the purview of the Treaty, but that this was a question *for the United States* authorities and *not for the carrier*, who would have been guilty, or might have been guilty, of a breach of his contract in refusing to carry persons designated to be carried by the United States" (Rec., p. 33, Finding XII).

When, therefore, the appellants furnished their vessels according to contract, and requisitions were issued for these 1,971 persons, and the whole 1,971 were transported, both of which facts are unequivocally found to be true by Finding XV of the Court of Claims (Rec., 34), it is wholly immaterial what the

"Auditor of the War Department decided," or whether these persons were counted "at the time and place of embarkation," or whether the *Court of Claims* regarded them as prisoners of war entitled to transportation.

It should be said, further, that, in addition to the requisition issued by the Quartermaster at Manila, based on the request from the Spanish authorities, as found by the Court (Rec., p. 34), the arrival of these persons at Barcelona is certified to officially by the American Consul at that port (Rec., p. 37). As to every one of these shipments, the American Consul certifies that—

> "*The following Spanish prisoners* have been furnished transportation from Manila, P. I., to Spain by J. M. Ceballos"—

and he then specifies the number of commissioned officers, the number of enlisted men, civilian officials, wives of officers and officials, and wives of enlisted men, &c., so that there cannot be any mistake as to the actual number transported and landed in Spain. The certificate of the American Consul at Barcelona, Mr. James G. Lay, in the form set out in the Record (p. 37) was given after the counting and landing of the prisoners from each of the fifteen last sailings, and he certifies to the transportation and landing of the full 1,971 (Rec., p. 36, bottom) whose transportation the Court finds in Finding XV (Rec., p. 34) was requested, and who were embraced in the Quartermaster's Requisitions on the request of the Spanish authorities.

THIRD POINT

If the construction of the contract, for which appellants contend, is rejected, then, since it appears that the "families"—"wives and children"—were actually "delivered" by the United States to the appellants for transportation, and were thereafter in fact transported in the cabins, the appellants are entitled to recover, upon a *quantum meruit*, a reasonable compensation for the service thus performed. In that view, the minds of the parties had met on everything except the compensation, which, however, may reasonably be measured by that stated in the contract for cabin accommodations, no other evidence having been adduced.

A recovery upon a *quantum meruit* may be had under the petition in the case at bar. There is no strict rule of pleading in the Court of Claims.

Clark vs. *U. S.*, 95 U. S., 539, 543.

If the construction of the contract between Ceballos & Company and the United States, hereinbefore contended for, is rejected by the Court, it still must be clear that the view of the contract set forth in the opinion of the Court of Claims cannot be sustained. It is equally clear, also, that the persons for whom the first class rate is demanded were actually *"treated" "as prisoners of war" by the United States and were actually delivered by it aboard ship and transported in the vessels supplied by the appellants* (Finding IV, Rec., p. 27; Finding XVIII, Rec., p. 38; and Finding I, last paragraph, Rec.,

p. 26; Finding X, Rec., p. 32). The Court finds that—

> "In performing the obligations of their contract, the petitioners supplied vessels with cabin accommodations and steerage accommodations, as had been agreed, and *in the cabins* were carried the officers, civil and military, *with their respective families*" (Rec., p. 32, Finding X).

The Secretary of War, in an official document directed to the Attorney General, sets forth his view of the contract, saying:

> "Under the terms of the Treaty of Peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the *rates of compensation for the transportation of such persons were not set forth in the contract*" (Finding XII, Rec., p. 33).

If the Court should concur in the view expressed by the Secretary of War (not concurred in by the Attorney General), then, as matter of law and justice, the appellants are entitled to compensation for the transportation of these persons, *thus actually delivered to them and carried*, at a *just and reasonable rate*, based upon the character of the accommodations furnished by the appellants and accepted by the United States in this transportation of its prisoners and other persons designated by the Secretary of War. The rate as fixed in the contract is $215 for cabin accommodations and $73.75 for steerage, and the rates were fixed after advertisement for bids issued by the Quartermaster of the Army, and after competitive bidding, so that these rates must be regarded as reasonable.

Again, if it be held that the phrase "other persons" can be wrested from the context and made to include all the people transported except actual soldiers, then we reply that, if this be true, the con-

tract expressly declares that appellants are to "provide third class or steerage accommodations, space and ventilation, for the enlisted men and other persons on board each ship"; and having complied with their obligation by providing steerage accommodations, if other and better accommodations were actually taken and used by the "prisoners of war," the appellants should be paid for the service the United States thus actually received. The United States "delivered" the persons on board ship, and knew their rank. The appellants did not, and had no authority to, assign the accommodations. They were mere carriers, acting solely under the direction and subject to the determination of the United States, which is now *bound to pay for the actual service rendered* by the appellants. So the Attorney-General has, as we conceive, in substance, expressly ruled and admitted.

23 Opin. Atty. Genl., at p. 17.

The appellants *furnished*, as required, *the cabin space*, and *that space was in fact occupied by these passengers of the United States—these "families."* That was an affair of the United States. They did not protest. *They must now pay for that space so occupied.* The authorities are quite to the point, and conclusive.

Even where the express contract with the Government is *void*, because resting in parol and not written, a plaintiff may recover the *value* of his services, for a complete or partial performance, "*as upon an implied contract for a quantum meruit.*"

> "*This value*, in the absence of any other evidence on the subject, *may be fairly assumed at what was stipulated for in the parol contract.*"
>
> *Clark* vs. *U. S.*, 95 U. S. 539, 542–543.

These observations are precisely applicable to the case at bar.

Here, the only real misunderstanding between the parties, as to the construction of the agreement, has

arisen with reference to the *rate of compensation* for the service *actually and properly rendered thereunder.* It is settled that—

> " *Where the parties contract* for the doing of certain work, *and the work is done, and accepted, and it appears that there was a misunderstanding as to the price to be paid for it, the law rejects the understanding of each, and awards reasonable compensation.*"
>
> *Turner* vs. *Webster*, 24 Kan., 38 (*headnote*, which perfectly expresses the decision).

In that case, the Court, speaking by BREWER, *J.*, and referring to the plaintiff's claim, said (at p. 40):

> " In other words, *the minds of the parties met upon everything but the compensation.* As to that, there was no *aggregatio mentium.* What, then, should result? Should he receive nothing, because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. *The law, disregarding both, says a reasonable compensation must be paid.*"

See also:

Goddard vs. *Foster*, 17 Wall., 123, at p. 141.

Fresh vs. *Gilson*, 16 Pet., 327, at p. 334.

Davis vs. *U. S.*, 120 Fed. Rep., 190, at p. 192.

FINALLY.

The judgment of the Court of Claims should be reversed, with instructions to enter a judgment for the plaintiffs for the amount due for the 198 persons carried and not paid for (payment to be adjudged in accordance with the contract rate for the accommodation actually provided), and for the sum of $215 for each wife and each child of all officers, civil and military, transported by the plaintiffs from the Philippine Islands, as found and described in the findings, first deducting all sums that may have been paid on account of such transportation, and for the sum of $215 for each other "prisoner of war" described in the fourth finding, who was actually furnished cabin accommodation, with a similar deduction for any sums actually paid on account of such transportation.

For a similar form of reversal, see—
Garrison vs. *U. S.*, 7 Wall., 688, 692.

WILLIAM V. ROWE,
JOHN J. HEMPHILL,
Of Counsel.

SULLIVAN & CROMWELL,
Attorneys.

[The Attorney-General's Opinion is appended.]

ATTORNEY-GENERAL'S OPINION.

(23 OPIN. ATTY.-GEN'L, 9.)

Printed by Appellants for convenience of Court.

---

*DEPARTMENT OF JUSTICE, *10
JANUARY 6, 1900.

SIR: I have the honor to acknowledge the receipt of your note of December 21, 1899, with its inclosures, in which you again ask my official opinion as to the propriety of a certain claim of J. M. Ceballos & Co., against your department arising out of a contract between the Secretary of War and J. M. Ceballos & Co. for the transportation of Spanish prisoners of war and others from the Philippines to Spain, in pursuance of the treaty of Paris.

In my note of the 20th ultimo, in reply to yours of the 13th, making a similar request for my opinion upon the same matter, I pointed out that, under certain rulings of my official predecessors, such questions as you present are, since the act of July 31, 1894 (chap. 174, sec. 8), properly addressed to the Comptroller of the Treasury, and should not be submitted to the Attorney-General, except in cases of great importance.

Your present note points out that this is a case of importance, and, further, that the questions involved a construction of the treaty of Paris, and the extent of the obligations resting upon the United States under that treaty, and which, *if decided one *11
way, may become the subject of diplomatic discussion between this country and Spain.

Accepting this as presenting a case exceptional to the general rule referred to, of my predecessors, and one coming within the exception stated in that rule, I willingly comply with your request for an opinion.

The questions presented in your notes have relation, chiefly, to the propriety of paying J. M. Ceball-

los & Co. for the transportation from the Philippines to Spain of certain non-combatants—wives and children of Spanish officers and soldiers, certain Spanish civilians, and their wives and children—and may be considered with reference to both the treaty with Spain and the contract of the War Department with J. M. Ceballos & Co.

The treaty of Paris, of December 10, 1898, Article V, paragraph I, provides that:

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them."

Article VI, paragraphs 2 and 3, are as follows:

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines."

"The Government of the United States will at its own cost return to Spain, and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisonors released, or caused to be released by them, respectively, under the article."

Strictly, there are three classes of persons for whose repatriation provision is thus made in this treaty, viz.:

FIRST.—"Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

SECOND.—"All persons made prisoners of war by the American forces."

THIRD.—"Spanish prisoners in the hands of the insurgents in Cuba and the Philippines," when released.

*But, so far as the treaty controls it, all these, *12
and all for whom any such provision is made, must have been, in some proper sense, prisoners—that is, held or deprived of their liberty by either the United States or the insurgents—for provision is made for no other. But, passing for the moment the expression "prisoners of war," it is not at all necessary, in order to their being prisoners within the meaning of this treaty stipulation, that these should have been combatants in any form. Our civil war, and most wars afford numerous examples of civilians taken and held as prisoners on account of war, and they are no less such, because non-combatants and unarmed.

Nor is it always necessary to their being such prisoners that their capture or detention be involuntary as to them. A wife or child may prefer to, and may follow the husband or father into captivity, and may share his imprisonment, to either its full or partial extent; still, while held and deprived of liberty by the opposing force, they may well be held to be prisoners, however voluntary may have been the original submission, just as voluntary hostages are prisoners.

And civilians, non-combatant, and unarmed persons may be, and often are, taken and held as prisoners in a war and because of it, and not for any other offense, and these are among the persons referred to in these treaty stipulations.

It will be noticed that the treaty, as above quoted, twice uses the term "prisoners of war." There are definitions, notably that in the Standard Dictionary, which limit the meaning of this phrase, "prisoner of war," to "a combatant or person in arms taken by the enemy, either by capture or surrender during a time of war." But I think this is too narrow a definition to express the modern meaning of the term, or its meaning as used in the treaty of Paris,

in that it excludes one who, though taking no actual part in the combat, and bearing no arms, may have been the directing head and governing hand of the whole conflict. Such a definition would make Jefferson Davis less a prisoner of war after his capture than was General Lee after his surrender.

Certainly the term was not used in this narrow sense in this treaty. This is obvious, for Article V, paragraph 1, provides that the United States shall
*13 send back to Spain all * "Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces." This, of course, embraces all armed combatants thus taken, and no further provision was required as to them; and no other provision would have been made, but that there were still other classes of prisoners not yet provided for, and for whom provision was made in Article VI, paragraphs 2 and 3, the first of which provides that "reciprocally, the United States will release all *persons* made prisoners of war by the American forces," "and will endeavor to obtain the release of all *Spanish prisoners* in the hands of the insurgents," and paragraph 3 provides for the return to Spain of all such prisoners as are thus released. Here are two classes of persons. The first are combatants, and clearly embrace all combatants who are here provided for. The second are as clearly persons other than combatants, and yet all are "prisoners of war" and are so described.

Now, if there were any soldiers or armed combatants thus taken and still held, not provided for in Article V, paragraph 1, they are included in Article VI. But the provisions of this article go also much further, and embrace "all *persons* made prisoners of war by the American forces," whether combatants or not. The fact that this provision is in an article separate and different from that providing for soldiers, and the change to a broader phraseology clearly express a broader meaning, and clearly show an intention to embrace persons other than combatants, and to include "all persons made

prisoners of war," whether combatants or not. It also clearly implies that the term "prisoners of war" was not intended to be restricted to actual combatants. This is further manifest from the stipulation that the United States will "undertake to obtain the release of all *Spanish prisoners* in the hands of the insurgents," without reference to whether they are combatants or not. Indeed, it is quite clear that the provisions of the treaty in this respect embrace non-combatant prisoners as well as soldiers.

This construction would be aided, if it were necessary, by the fact that it is difficult to perceive why a distinction should be made between different kinds of prisoners, based upon any real or supposed difference between a technical *prisoner of war* 14 and any other prisoner taken during war, and because of, on account of, and in the prosecution of war; and is the more readily adopted because the United States can afford and is disposed to adopt a liberal construction.

I am, therefore, of opinion that the treaty of Paris contemplates and provides for the repatriation by the United States of all prisoners captured and held by it, or held and released by the insurgents—soldiers or civilians, men, women, and children—and whether their detention was originally voluntary as to them or otherwise.

I do not consider the question whether, when in a foreign land, an officer or soldier is taken prisoner, his wife and minor children with him there, might not, under such a liberal construction of this treaty as the United States might well adopt, be considered as constructively prisoners also; or whether, on the other hand, it was intended that the officer or soldier should be returned to Spain, leaving his wife and children in the Philippines, because, as will be seen, when speaking of the contract itself, it is not necessary.

But does the question of paying J. M. Ceballos & Co. depend upon the treaty stipulations above

quoted? It appears that for the purpose of carrying out these provisions, the War Department entered into a contract with J. M. Ceballos & Co. by which that company agreed and bound itself to receive on shipboard, in the Philippines, and transport "such number of prisoners of war *and persons* as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain."

This company further agreed and was bound "to provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war *and such other persons* as may be designated by the Secretary of War, with cabin accommodations for all officers, and-third class or steerage accommodations, with ample galley accom-
*15 modations *space, and ventilation for the enlisted men and *any other persons* on board such ship."

And, for this service, the Secretary of War agrees to pay as follows:

"For the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215), and for each enlisted man, private soldier *or other person* designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75). * * * It is further agreed that the prisoners of war *and all other persons to be transported* shall be delivered by the United States on board the ship at such ports in the Philippine Islands as may be designated by the Secretary of War. * * * On account of the number of officers, enlisted men, *or other persons* to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made *upon the basis of the number of officers, enlisted men, and persons counted on such ship.*"

From all this it is entirely certain that, under this contract, J. M. Ceballos & Co. had no control over or anything whatever to do with determining what persons, or how many should be thus received, subsisted and transported, nor in determining the class of such persons, as soldiers or civilians, nor in determining whether the persons so tendered for transportation came within any of the classes described in the treaty of Paris. The authorities of the United States only were authorized to decide this, and, with their decision, this steamship company had nothing to do, but was bound to receive and transport all who were thus tendered. And if that company has performed this service under this contract, the payment therefor cannot be made to depend upon the wisdom or correctness of that decision.

Assuming that the Secretary of War was authorized to make a contract for the return to Spain of the persons referred to in the Treaty of Paris, and, under that authority, made the contract in question here, and that this company has in good faith performed its part of it, the payment *there- *16
for cannot be affected by the fact, if it be so, that the agent of the United States, the Secretary of War, or his subordinates exceeded his authority by tendering for transportation some persons also who, as afterwards decided, did not come within the purview of that treaty. The United States had the right to adopt, as against itself, as liberal a construction of that treaty as it chose; and it was neither the duty of, nor was it within the province of this steamship company, a mere carrier, to question the wisdom, propriety or correctness of that construction. To say the least of it, it was questionable whether all the persons tendered and transported were not within the purview of the treaty, at least, under such a liberal construction as the United States might, under the circumstances, well adopt. And this was a question for the United States authorities and not for the

carrier, who would have been guilty or might have been guilty of a breach of his contract, and would certainly have put the Government to great trouble and expense had the company stopped the whole business of embarkation by an inquiry as to the proper construction of the Spanish treaty, and an investigation as to whether all the persons tendered came within its provisions. Nor is it probable, under the circumstances, and with the force there at its command, that the United States would have tolerated any such impertinence or delay.

Nor can it be said that when referred to the treaty, the contract was *ultra vires* the Secretary of War, as being applicable to persons not within the purview of that treaty, and of which said contractors were bound to take notice, for the contract, both in its preamble and terms, is for the transportation of prisoners only, and by no fair construction can it be made one for the transportation of other than prisoners, and was, therefore, within the treaty provisions. It is possible that persons who were not prisoners have been transported under it, but not because the contract provides for it. The contract, then, being legal and binding, the most that can be said, if even such be the fact, is that in the performance of that contract the United States authorities made a mistake and tendered for transportation some *persons not within the purview of the contract. But, as already said, it rested alone with the United States authorities to say who should be taken as prisoners, and as to which the carrier had neither voice, knowledge, nor means of knowledge, but was, by the express terms of this agreement, bound to carry all who were designated and tendered. When one contracting party requires of the other more than should be required, but which the other is bound to do, if required, and does it, it would be a novel rule which would permit the first party to refuse payment upon the ground that he ought not to have required so much.

*17

Even if some persons were tendered, and therefore transported, who did not come within the purview of either the treaty or the contract, this did not affect the validity of the contract, which, rightly construed, is one for the transportation of prisoners only, but was merely an error in performance, and one for which the United States authorities alone were responsible.

As between these contracting parties, it rested alone with the United States to say whom it would send back to Spain, and, in doing so, to alone determine who were prisoners and who came within the purview of the treaty or the contract. And having done this by its authorized agents, and compelled the carrier to accept such decision and perform the service thus required, it does not lie with the United States now to refuse payment upon the ground that it or its agents were mistaken and required more than they should have done.

I am therefore of opinion, that the United States should pay J. M. Ceballos & Co. the contract price for all of the persons so tendered, transported, subsisted, and delivered.

The remainder of your questions has relation to the price to be paid on account of "other persons" than officers, enlisted men, soldiers.

The contract speaks of "officers," "enlisted men," "soldiers," "prisoners of war," and "other persons." As to the officers and enlisted men, soldiers, there appears to be no question. For the former $215 and for the latter $73.75 *per capita* is to be paid. I think the word "officers" may *in- *18
clude as well civil as military officers, if there were any such held as prisoners and transported. As to the "other persons" transported, I think the construction of the contract is reasonably certain.

There are but two kinds of accommodations on shipboard provided for in the contract for all persons to be transported, viz., "cabin accommodations for all officers, and third-class or steerage accommodations, with ample galley accomodations,

space and ventilation, for the enlisted men *and other persons* on board such ship." And there are but two rates of price to be paid for this service, viz., for "such commissioned officers the sum of two hundred and fifteen dollars ($215), and for each enlisted man, private soldier, *or other person* designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75)."

These two rates of prices, the only ones for the payment of which the contract provides, are the only payments which can be made under the contract, viz., $215 for each officer, military or civil, and $73.75 for each person other than officer so transported.

Respectfully,

JOHN W. GRIGGS.

The Secretary of War.